ORIGINAL

No. S209125

In the Supreme Court of the State of California

CAROLYN GREGORY,

Plaintiff and Appellant,

vs.

LORRAINE COTT AND BERNARD COTT,

Defendants and Respondents.

RESPONDENTS' RESPONSE TO APPELLANT'S SUPPLEMENTAL BRIEF

After a Decision By The Court Of Appeal
Second Appellate District, Division Five, Case No. B237645

Appeal From A Summary Judgment
Los Angeles County Superior Court, Case No. SC109507
Honorable Gerald Rosenberg

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I.

ARGUMENT

In her Supplemental Brief, Carolyn Gregory ostensibly requests judicial notice—which this Court has since denied—but then takes the opportunity to provide additional argument, ancillary to her request for judicial notice, long after the briefing concluded. She obfuscates the issues here by raising an implausible analogy to automobile safety and an unsupported connection between imposition of liability on the Cotts and the promotion of Alzheimer's research, and then attempts to reinvigorate her argument that Civil Code section 41 mandates liability here. None of these arguments are persuasive.

Ms. Gregory's notion that automobile safety could have any relevance to the primary assumption of risk doctrine in the context of occupational hazards is nonsensical. The analogy between a seat belt statute and increased automobile safety devices on the one hand and imposition of liability on the Cotts in these circumstances is illusive at best.

Similarly unreasonable is Ms. Gregory's attempt to foist crushing and unnecessary liability on Alzheimer's patients and their spouses for injuries to their caregivers to motivate medical researchers to find a cure for Alzheimer's. Ms. Gregory does not attempt to explain the asserted connection. To the contrary, the literature establishes that medical researchers are already giving

Alzheimer's research all the attention they can, in order to find a cure for this devastating disease. With the nature of the disease, societal issues, recognition for whomever finds a cure, and monetary rewards that would come from curing Alzheimer's, the incentives already provided by American society will not be supplemented by imposing liability on the Cotts.

Instead of Ms. Gregory's belated and ill-conceived "policy" arguments, this case should be resolved on this Court's precedents, which state a clear test for applying occupational primary assumption of risk based on the plain policy that "it is unfair to charge the defendant with a duty of care to prevent injury to the plaintiff arising from the very condition or hazard the defendant has contracted with the plaintiff to remedy or confront." (*Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532, 542.) Ms. Gregory was hired by the Cotts through a reputable agency to care for an Alzheimer's patient, including protecting that patient from injuring herself and others due to her violent tendencies. (See *Herrle v. Estate of Marshall* (1995) 45 Cal.App.4th 1761, 1765 (*Herrle*).) It would be unfair to charge the Cotts with a duty of care to prevent injury to Ms. Gregory from the very condition or hazard the Cotts contracted for Ms. Gregory to provide. (*Ibid.*)

Ms. Gregory also raises Civil Code section 41 again, but she again fails to explain why section 41 should operate to create *greater* liability for the mentally infirm than for others. As established in *Priebe v. Nelson* (2006) 39 Cal.4th 1112, 1128, the

primary assumption of risk doctrine operates regardless of whether a separate liability statute might exist to protect the innocent public from a danger by imposing liability where there might otherwise be none. "Civil Code section 41 is intended to place the incompetent person in the same posture as the competent person, not in a legally worse position. Where no duty exists in the first place, section 41 does not create one." (*Herrle, supra,* 45 Cal.App.4th at p. 1766.)

Ultimately, through her arguments here and below, Ms. Gregory has narrowed this appeal to one issue—whether it makes a difference under the primary assumption of risk doctrine that the caregiver was in-home. That narrow focus is evident in myriad manifestations. Among other things, Ms. Gregory repeatedly concedes that *Herrle, supra,* 45 Cal.App.4th 1761 was correctly decided. (*E.g.*, ARB 12-13; ASB 3.) She also asserts that Bernard Cott was negligent by failing to institutionalize Lorraine Cott, and would have been relieved of liability by relying on institutional caregivers, rather than an in-home caregiver, such as Ms. Gregory. (AOB 20.) And Ms. Gregory repeatedly asserts the purported virtues of institutionalizing late-stage Alzheimer's patients [*e.g.*, ARB 2], while largely ignoring the express legislative public policy to minimize the institutionalization of the elderly and incompetent. (Health & Saf. Code, § 1570.2.)

This underlying thread—that people who do not institutionalize their loved ones with Alzheimer's are negligent for, instead, hiring a professional caregiver to take on the task of

confronting any danger due to combativeness and violence in-home—lacks any legal basis. Despite pinning her entire argument on the fact that she was an in-home caregiver, Ms. Gregory has yet to provide any meaningful distinction of institutional care or any distinction at all grounded on this Court's settled precedent.

The undisputed test for occupational primary assumption of risk is (1) whether the risk causing injury was inherent in the job to be performed, and (2) whether the nature of the relationship of the parties is such that the defendant hired the plaintiff to confront the risk. (*Neighbarger*, *supra*, 8 Cal.4th at p. 538). Ms. Gregory's claims that in-home caregiving is riskier than caregiving in an institution only underscore that the risk of combativeness or violence from Alzheimer's patients is inherent in the job of caring for them, wherever the caregiver provides the care. And there can be no dispute that the Cotts contracted with CarenetLA to provide a professional caregiver to confront the risks associated with caring for an Alzheimer's patient. Applying the undisputed facts to settled law, the ineluctable conclusion is that occupational primary assumption of risk applies here.

II.

CONCLUSION

For the foregoing reasons, Bernard and Lorraine Cott respectfully request that this Court affirm the judgment of the Court of Appeal.

DATED: April 28, 2014.

REED SMITH LLP

By Margaret M. Grignon
Margaret M. Grignon

Certificate Of Word Count
Pursuant To California Rules Of Court, Rule 8.504(d)(1)

I, Margaret M. Grignon, declare and state as follows:

1. The facts set forth herein below are personally known to me, and I have first-hand knowledge thereof. If called upon to do so, I could and would testify competently thereto under oath.

2. I am one of the appellate attorneys principally responsible for the preparation of the Respondents' Response To Appellant's Supplemental Brief this case.

3. The brief was produced on a computer, using the word processing program Microsoft Word 2010.

4. According to the Word Count feature of Microsoft Word 2010, the Respondents' Response To Appellant's Supplemental Brief contains 917 words, including footnotes, but not including the table of contents, table of authorities, and this Certification.

5. Accordingly, the Respondents' Response To Appellant's Supplemental Brief complies with the requirement set forth in Rule 8.504(d)(1), that a brief produced on a computer must not exceed 2,800 words, including footnotes.

I declare under penalty of perjury that the forgoing is true and correct and that this declaration is executed on April 28, 2014, at Los Angeles, California.

Margaret M. Grignon

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 355 South Grand Avenue, Suite 2900, Los Angeles, CA 90071. On April 28, 2014, I served the following document(s) by the method indicated below:

RESPONDENTS' RESPONSE TO APPELLANT'S SUPPLEMENTAL BRIEF

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Rebecca R. Rich

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